



[3410-11-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 220

RIN 0596-AD01

National Environmental Policy Act: Categorical Exclusions for Soil and Water

Restoration Activities

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed rule; request for public comment.

SUMMARY: The United States Department of Agriculture, Forest Service, is proposing to supplement its National Environmental Policy Act (NEPA) regulations (36 CFR Part 220) with three new categorical exclusions for activities that restore lands negatively impacted by water control structures, natural and human caused events, and roads and trails. These categorical exclusions will allow the Forest Service to more efficiently analyze and document the potential environmental effects of soil and water restoration projects that are intended to restore the flow of waters into natural channels and floodplains by removing water control structures, such as dikes, ditches, culverts and pipes; restore lands and habitat to pre-disturbance conditions, to the extent practicable, by removing debris, sediment, and hazardous conditions following natural or human-caused events; and restore lands occupied by roads and trails to natural conditions.

The proposed road and trail restoration category would be used for restoring lands impacted by non-system roads and trails that are no longer needed and no longer

maintained. This category would not be used to make access decisions about which roads and trails are to be designated for public use.

DATES: Comments must be received in writing on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Submit comments online at <http://www.regulations.gov>. Submit written comments by addressing them to Restoration CE Comments, PO Box 4208, Logan, UT 84323, or by facsimile to (801) 397-1605. Please identify your written comments by including “Categorical Exclusions” on the cover sheet or the first page. Electronic comments are preferred. For comments sent via U.S. Postal Service, please do not submit duplicate electronic or facsimile comments. Please confine comments to the proposed rule on Categorical Exclusion for Restoration Activities.

All comments, including names and addresses, when provided, will be placed in the record and will be available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT:

Peter Gaulke, Ecosystem Management Coordination Staff, (202) 205-1521.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877-8339 between 8:00 a.m. and 8:00 p.m. eastern standard time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Need for the Proposed Rule.

In 2009, Secretary of Agriculture Tom Vilsack called for restoring forestlands to protect water resources, the climate, and terrestrial and aquatic ecosystems. The Forest Service spends significant resources on NEPA analyses and documentation for a variety

of land management projects. The Agency believes that it is possible to improve the efficiency of the NEPA process to speed the pace of forest and watershed restoration, while not sacrificing sound environmental analysis.

For decades, the Forest Service has implemented terrestrial and aquatic restoration projects. Some of these projects encompassed actions that promoted restoration activities related to floodplains, wetlands and watersheds, or past natural or human-caused damage. The Forest Service has found that under normal circumstances the environmental effects of some restoration activities have not been individually or cumulatively significant. The Forest Service's experience predicting and evaluating the environmental effects of the category of activities outlined in this proposed rule has led the Agency to propose supplementing its NEPA regulations by adding three new categorical exclusions for activities that achieve soil and water restoration objectives.

The Forest Service's proposed categorically excluded actions promote hydrologic, aquatic, and landscape restoration activities. All three categorical exclusions involve activities that are intended to maintain or restore ecological functions and better align the Agency's regulations, specifically its categorical exclusions, with the Agency's current activities and experiences related to restoration.

The restoration of lands occupied by unmaintained non-system roads and trails (National Forest System Roads and Trails are defined at 36 CFR 212.1) is important to promote hydrologic, aquatic, and watershed restoration. Activities that restore lands occupied by a road or trail may include reestablishing former drainage patterns, stabilizing slopes, restoring vegetation, blocking the entrance to the road, installing waterbars, removing culverts, removing unstable fills, pulling back road shoulders, and

completely eliminating the road bed by restoring natural contours and slopes. The Forest Service experience is that the majority of issues associated with road and trail decommissioning arise from the initial decision whether to close a road or trail to public use rather than from implementing individual restoration projects.

The Forest Service believes it is appropriate to establish soil and water restoration categorical exclusions based on NEPA implementing regulations at 40 CFR §1500.4(p) and 1500.5(k), which identify a categorical exclusion as a means to reduce paperwork and delays in project implementation, and the Agency's abundance of information showing that the majority of these identified restoration actions have no significant impacts.

Pursuant to CEQ's implementing regulations at 40 CFR §1507.3 and the November 23, 2010, CEQ guidance memorandum on "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act," the Forest Service gathered information supporting establishment of these three categorical exclusions using the following four methods:

(1) The Forest Service reviewed EAs that implemented actions that were entirely or partially covered under one of the proposed categorical exclusions. This review showed that these projects did not individually or cumulatively result in a significant effect on the human environment.

(2) The Forest Service consulted with professional staff and experts who have experience leading interdisciplinary teams and conducting environmental analysis of project proposals, implementing restoration activities, guiding the development and execution of restoration programs, and studying the techniques, effects, and outcomes

associated with soil and water restoration activities. The experience of these professional staff included persons from every Forest Service and nearly every geographic region across the United States, including Alaska.

(3) The Forest Service also studied peer-reviewed scientific analyses, research papers, and monitoring reports about activities identified under these categorical exclusions.

(4) Finally, the Forest Service reviewed categorical exclusions adopted by eight other federal agencies that cover activities that are comparable in size and scope and that are implemented under similar natural resource conditions with similar environmental impacts to those covered under the categories in this proposed rule.

Based on this review, the Forest Service finds that the proposed categorical exclusions would not individually or cumulatively have significant effects on the human environment. The Agency's finding is predicated on data from implementing comparable past actions; the expert judgment of the responsible officials who made the findings for the projects reviewed for this supporting statement; information from other professional staff and experts, and scientific analyses; a review and comparison of similar categorical exclusions implemented by other federal agencies; and the Forest Service's experience implementing soil and water restoration activities and subsequent monitoring of potential associated impacts. Additional information is available at

<http://www.fs.fed.us/emc/nepa/restorationCE>.

Implementing the Proposed Categorical Exclusion

Actions relying on one of these categorical exclusions remain subject to agency requirements to conduct scoping and require a determination that there are not extraordinary circumstances that would otherwise require documentation in an EA or EIS. These proposed categorical exclusions would require a project or case file and decision memo, including, in part, a rationale for using the categorical exclusion and a finding that extraordinary circumstances do not require documentation in an EA or EIS.

Regulatory Certification

Environmental Impact

The intent of the proposed rule is to increase administrative efficiency in connection with conducting important restoration activities on National Forest System lands while assuring that no significant environmental effects occur. The proposed amendment of Forest Service NEPA Regulations (36 CFR 220.6) concerns NEPA documentation for certain types of soil and water restoration activities. The Council on Environmental Quality does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. Agencies are required to adopt NEPA procedures that establish specific criteria for, and identification of, three classes of actions: Those that require preparation of an EIS; those that require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). Categorical exclusions are one part of those agency procedures, and therefore establishing categorical exclusions does not require preparation of a NEPA analysis or document. Agency NEPA procedures are internal procedural guidance to assist agencies in the fulfillment of agency

responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing categorical exclusions does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd*, 230 F. 3d 947, 954–55 (7th Cir. 2000).

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on regulatory planning and review. The Office of Management and Budget has determined that this is not a significant rule. The proposed rule would not have an annual effect of \$100 million or more on the economy, nor would it adversely affect productivity, competition, jobs, the environment, public health or safety, or state or local government. This proposed rule would not interfere with an action taken or planned by another agency, nor would it raise new legal or policy issues. Finally, this proposed rule would not alter the budgetary impacts of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients of such programs.

Regulatory Flexibility Act

This proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The Agency has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities as defined by the Act because the proposed rule would not impose record-keeping requirements; it

does not affect their competitive position in relation to large entities; and it would not affect their cash flow, liquidity, or ability to remain in the market.

Federalism

The Agency has considered this proposed rule under the requirements of Executive Order 13132, “Federalism.” The Agency has concluded that the proposed rule conforms with the federalism principles set out in this Executive Order; would not impose any compliance costs on the states; and would not have substantial direct effects on the states or the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary.

Consultation and Coordination with Indian Tribal Governments

Pursuant to Executive Order 13175 of November 6, 2000, “Consultation and Coordination with Indian Tribal Governments,” the Agency has assessed the impact of this proposed rule on Indian Tribal governments and has determined that it would not significantly or uniquely affect communities of Indian Tribal governments. The proposed rule deals with requirements for NEPA analysis and has no direct effect on occupancy and use of National Forest System lands. The Agency has also determined that this proposed rule would not impose substantial direct compliance costs on Indian Tribal governments or preempt Tribal law. Therefore, it has been determined that this proposed rule would not have Tribal implications requiring advance consultation with Indian Tribes.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights.” The Agency has determined that the proposed rule would not pose the risk of a taking of protected private property.

Civil Justice Reform

The Agency has reviewed this proposed rule under Executive Order 12988 of February 7, 1996, “Civil Justice Reform.” After adoption of this proposed rule, (1) all state and local laws and regulations that conflict with this rule or that would impede full implementation of this rule would be preempted; (2) no retroactive effect would be given to this proposed rule; and (3) the proposed rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), which the President signed into law on March 22, 1995, the Agency has assessed the effects of this proposed rule on state, local, and Tribal governments and the private sector. This proposed rule would not compel the expenditure of \$100 million or more by any state, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Energy Effects

The Agency has reviewed this proposed rule under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution,

or Use.” The Agency has determined that this proposed rule does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any additional record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use, and therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 220

Administrative practices and procedures, Environmental impact statements, Environmental protection, National forests, Science and technology.

For the reasons set out in the preamble, the Forest Service proposes to amend part 220 of title 36 of the Code of Federal Regulations as follows:

PART 220–NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

COMPLIANCE

1. The authority citation for 36 CFR Part 220 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; E.O. 11514; 40 CFR parts 1500-1508; 7 CFR part 1b.

2. In §220.6, add paragraphs (e)(18), (19), and (20) categorical exclusion categories read as follows:

§220.6 Categorical exclusions.

* * * * *

(e)***

(18) Restoring wetlands, streams, and riparian areas by removing, replacing, or modifying water control structures such as, but not limited to, dams, levees, dikes, ditches, culverts, pipes, valves, gates, and fencing, to allow waters to flow into natural channels and floodplains and restore natural flow regimes to the extent practicable.

Examples include but are not limited to:

(i) Removing, replacing, or repairing existing water control structures that are no longer functioning properly; only minimal dredging, excavation, or placement of fill is required and do not involve releasing hazardous substances;

(ii) Installing a newly designed culvert that replaces an existing inadequate culvert to improve aquatic organism passage or prevent resource or property damage where the road or trail maintenance level does not change; and

(iii) Removing a culvert and installing a bridge to improve aquatic and/or terrestrial organism passage or prevent resource or property damage where the road or trail maintenance level does not change.

(19) Removing debris and sediment following natural or human-caused disturbance events (such as floods, hurricanes, tornados, mechanical/ engineering failures, etc.) to restore uplands, wetlands, or riparian systems to pre-disturbance conditions, to the extent practicable, such that site conditions will not impede or negatively alter natural processes.

Examples include but are not limited to:

(i) Removing deposited debris and sediment resulting from natural or human-

caused disturbance events from impacted sites using manual or mechanized equipment where minimal excavation is required;

(ii) Clean-up and removal of infrastructure debris, such as, benches, tables, outhouses, concrete, culverts, and asphalt following a flood event from a stream reach and/or adjacent wetland area;

(iii) Removal of downed or damaged trees that limit or reduce public access, result in potential risks to public safety, or where removal is needed to restore wildlife, or protect infrastructure; and

(iv) Stabilizing stream banks and associated stabilization structures to reduce erosion through bioengineering techniques following a natural or human-caused event, including the utilization of living and nonliving plant materials in combination with natural and synthetic support materials, such as rocks, riprap, geo-textiles, for slope stabilization, erosion reduction, and vegetative establishment and establishment of appropriate plant communities (bank shaping and planting, brush mattresses, log, root wad, and boulder stabilization methods).

(20) Activities that restore, rehabilitate, or stabilize lands occupied by non-National Forest System roads and trails to a more natural condition that may include removing, replacing, or modifying drainage structures and ditches, reestablishing vegetation, reshaping natural contours and slopes, reestablishing drainage-ways, or other activities that would restore site productivity and reduce environmental impacts. Examples include but are not limited to:

- (i) Decommissioning of a non-system road to a more natural state by restoring natural contours and removing construction fills, revegetating the roadbed and removing ditches and culverts;
- (ii) Restoring a non-system trail by reestablishing natural drainage patterns, stabilizing slopes, reestablishing vegetation, and installing water bars;
- (iii) Completely eliminating the roadbed of unauthorized roads by loosening compacted soils, removing culverts, reestablishing natural drainage patterns, restoring natural contours, and restoring vegetation; and
- (iv) Installing boulders, logs, and berms on a non-system trail segment to promote naturally regenerated grass, shrub, and tree growth.

Thomas L. Tidwell
Chief, Forest Service

May 11, 2012
Date